

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045, entitled "Protection of Children From Environmental Health Risks and Safety Risks" (62 FR 19885 (April 23, 1997)), applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation.

This rule is not subject to the Executive Order because it is not a significant regulatory action under Executive Order 12866 and is not based on health or safety risks. This rule simply reaffirms the promulgation of Acid Rain Program rule revisions that were previously issued and that are still in effect and have been since mid-2006. Moreover, when first promulgated, these revisions implemented certain requirements of the Acid Rain Program that were not based on health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, entitled "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g.,

materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rule simply reaffirms the promulgation of Acid Rain Program rule revisions that were previously issued and that are still in effect and have been since mid-2006. Moreover, when first promulgated, these revisions did not address the use of any technical standards. Thus, this rule is not subject to the NTTAA.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (February 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not change the level of protection provided to human health or the environment, but simply reaffirms the promulgation of Acid Rain Program rule revisions that were previously issued and that are still in effect and have been since mid-2006. Moreover, when first promulgated, these revisions did not change the level of protection provided to human health or the environment.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule

cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective on December 15, 2008 for good cause found as explained in Section II of this preamble.

List of Subjects in 40 CFR Parts 72, 73, 74, 77, and 78

Environmental protection, Acid rain, Administrative practice and procedure, Air pollution control, Electric utilities, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: December 5, 2008.

Stephen L. Johnson,
Administrator.

[FR Doc. E8-29382 Filed 12-12-08; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 070920529-81555-02]

RIN 0648-AW05

Magnuson-Stevens Act Provisions; Limited Access Privilege Programs; Individual Fishing Quota Referenda Guidelines and Procedures for the New England Fishery Management Council, the Gulf of Mexico Fishery Management Council, and the National Marine Fisheries Service

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues a final rule implementing guidelines and procedures for the New England Fishery Management Council (NEFMC) and the Gulf of Mexico Fishery Management Council (GMFMC) (collectively the Councils) and NMFS to follow in determining procedures and voting eligibility requirements for referenda on Individual Fishing Quota (IFQ) program proposals in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, as amended (Magnuson-Stevens Act). The intended effect of these procedures and guidance is to help develop IFQ program referenda in the New England and Gulf of Mexico fisheries that are fair and equitable.

DATES: This rule is effective January 14, 2009.

ADDRESSES: Copies of the Regulatory Impact Review (RIR) prepared for this action may be obtained from the mailing address listed here or by calling Robert Gorrell, NMFS-SF, 1315 East-West Highway, Silver Spring, MD 20910 (also see **FOR FURTHER INFORMATION CONTACT**).

This **Federal Register** document is also accessible via the Internet at: <http://www.access.gpo.gov/su-docs/aces/aces140.html>.

FOR FURTHER INFORMATION CONTACT:

Robert Gorrell, at 301-713-2341 or via e-mail at robert.gorrell@noaa.gov.

SUPPLEMENTARY INFORMATION: NMFS

published the proposed rule for this action in the **Federal Register** on April 23, 2008 (73 FR 21893) with a public comment period through June 23, 2008. NMFS received comments from 11 commenters. Responses to these comments are discussed under the Comments and Responses section of this preamble.

Section 303A of the Magnuson-Stevens Act specifies general requirements for Limited Access Privilege (LAP) programs implemented in U.S. marine fisheries. A LAP is defined as a Federal limited access permit that provides a person the exclusive privilege to harvest a specific portion of a fishery's total allowable catch. This definition encompasses exclusive harvesting privileges allocated to participants under IFQ programs.

Section 303A(c)(6)(D) of the Magnuson-Stevens Act outlines specific requirements for IFQ program proposals developed by the NEFMC and GMFMC. Specifically, the Magnuson-Stevens Act requires such program proposals to be approved through referenda before they may be submitted for review and implementation by the Secretary of Commerce (Secretary). Additionally, the Magnuson-Stevens Act requires the Secretary to publish guidelines and procedures to (1) determine procedures and voting eligibility requirements for IFQ program referenda, and (2) to conduct such referenda in a fair and equitable manner.

A referendum conducted on a NEFMC IFQ program proposal must be approved by more than 2/3 of those voting in the referendum among eligible permit holders and other eligible voters. The Magnuson-Stevens Act requires that the Secretary promulgate criteria to determine whether additional fishery participants are eligible to vote in NEFMC IFQ program referenda, in order to ensure that crew members who derive a significant percentage of their total income from a proposed IFQ fishery are eligible to participate in an IFQ referendum.

A referendum conducted on a GMFMC IFQ program proposal must be approved by a majority of those voting in the referendum. For Gulf of Mexico fisheries managed with multispecies permits, the Magnuson-Stevens Act limits eligible referenda voters to those permit holders who have substantially fished the species to be included in the proposed IFQ program.

This final rule establishes procedures for initiating, conducting, and determining the outcome of IFQ program referenda, as well as guidelines for specifying referenda voting eligibility requirements. These procedures and guidelines are intended to ensure referenda conducted on IFQ program proposals are fair and equitable, while providing the flexibility to develop IFQ program referenda voting eligibility requirements on a fishery-specific basis, in accordance with the Magnuson-Stevens Act and other applicable law.

These procedures and guidelines also would apply to referenda conducted in association with any IFQ program proposal advanced through a Secretarial fishery management plan (FMP) or FMP amendment under the authority of section 304(c) of the Magnuson-Stevens Act for a New England or Gulf of Mexico fishery. Any Secretarial IFQ program proposal must be approved by a majority of the voting members, present and voting, of the appropriate Council before it can be included in a Secretarial FMP or FMP amendment.

For a discussion of these procedures and guidelines, i.e., initiating referenda, voter eligibility, ensuring referenda are fair and equitable, conducting referenda, and deciding referenda, please see the preamble to the proposed rule published on April 23, 2008 (73 FR 21893).

Comments and Responses

The public comment period on the proposed rule closed on June 23, 2008. A total of 11 commenters submitted comments (via e-mail, fax, and regular mailing) to NMFS on behalf of five individual fishermen, the New England Fishery Management Council, and five non-governmental organizations with fisheries and environmental interests. These organizations were the Associated Fisheries of Maine, the Southern Shrimp Alliance, Inc., the Environmental Defense Fund, the Food & Water Watch, and the Ocean Conservancy. Their comments are summarized and responded to below.

Comment 1: A number of respondents offered comments relative to specific IFQ programs (both existing and in development) rather than commenting

on the proposed procedures and guidelines for conducting a referendum.

Response: These comments are outside the scope of this action. NMFS acknowledges the comments but will not respond in this document. Opportunities for public comment on specific IFQ programs are available or will be during the normal Council plan amendment and rulemaking processes.

Comment 2: The rule would establish rather broad guidelines within which the Councils would develop IFQ referendum voter eligibility criteria and referendum details. Several respondents supported the flexibility afforded by the broad guidelines, noting that they provided Councils with the ability to prepare criteria and program details suited specifically to the proposed IFQ fishery. One member of the public stated that the guidelines are overly broad and give NMFS unbridled discretion, which may result in an unfair and inequitable referendum, especially from the perspective of owners of small vessels. Another supported the broadness of the guidelines, indicating that the referenda need to be developed on a case-by-case basis and suggesting that more detailed or constrained guidelines would likely be too complicated to execute.

Response: The fisheries managed by the New England and Gulf of Mexico Fishery Management Councils vary greatly in terms of number of participants, geographic range, fishing method, and value. The IFQ program proposals could introduce even more variability to the situations and issues to be addressed by the Councils as they develop referendum eligibility criteria. Rather than constrain the Councils with detailed referendum eligibility requirements, and in order to accommodate the potential variety of IFQ proposals and voter situations, NMFS has decided to set general eligibility standards and referendum procedures at this time. More specific criteria and procedures for each proposed IFQ program will be developed by the Councils and implemented by NMFS when the details of the IFQ program proposals are known. The Councils, when requesting that NMFS conduct an IFQ referendum, would have to analyze the recommended eligibility criteria and justify the criteria selected.

Although the proposed rule contained general eligibility requirements for referendum participation, the guidelines do not give NMFS or the Councils "unbridled discretion" in this regard. NMFS and the Councils will develop referendum eligibility requirements for proposed IFQ programs consistent with

the Magnuson–Stevens Act, including the National Standards, and other applicable law.

The procedures and guidelines are neutral relative to vessel size, past landings, and other criteria that may factor into voter eligibility. These procedures and guidelines do not favor large vessels over small vessels, or vice versa. IFQ programs can be designed by the Councils to reflect a wide variety of Council and public priorities. Accordingly, the Councils will have the discretion to establish a vote weighting system or to count votes on a per permit basis, to meet these priorities while providing meaningful participation for each fishery segment.

Comment 3: Under the proposed rule, those participants in a Gulf of Mexico fishery who have substantially fished the species under consideration in an IFQ program would be eligible to vote in the referendum. One respondent stated that it is unfair to define “participants who have substantially fished” as those permit holders with larger vessels, concluding this would disenfranchise the small vessel fishermen in the Gulf of Mexico. Another respondent stated this provision would discriminate against small boat operators. A third respondent stated that all those having fished the species being considered in the IFQ program should be eligible to vote in the referendum. Two respondents were in favor of the substantially fished provision because they advocate for the position that the fate of the IFQ program appropriately rests with participants who have a vested interest in the proposed IFQ fishery.

Response: The Magnuson–Stevens Act limits eligible voters in a referendum for a Gulf of Mexico multispecies fishery to holders of multispecies permits who have “substantially fished” the species to be included in the proposed IFQ program. However, the Magnuson–Stevens Act does not define “substantially fished.” The definition of “substantially fished” may vary for each IFQ program because the Council will take into consideration various eligibility criteria including past and present participation in the fishery, and the full range of entities likely to be eligible for initial IFQ allocations, as well as other factors to be determined by the Council. There will be opportunities to comment on referendum eligibility criteria for specific IFQ program proposals in the rulemaking procedures undertaken for those proposals.

Comment 4: Two respondents stated that applying differential weighting to referendum votes would be unfair and would exclude or diminish the

importance of smaller scale fishing community members. Two other respondents expressed their support of vote weighting. One noted that vote weighting could help to ensure permit holders in the Gulf of Mexico who “substantially fished” would largely influence the outcome of the referendum.

Response: The rule provides for the possibility of vote weighting, but it does not require weighting; furthermore, the rule does not specify any criteria for weighting votes. For instance, the New England Council could develop a referendum proposal that does not weight votes at all; or it could apply a weighting formula that considers a variety of parameters, such as landings, vessel size, time in the fishery, amount of fishing activity, number of crew, etc. Depending on the goals of the Council and the proposed IFQ program, these parameters could balance the way certain sectors of the fishery participate in the referendum. For example, if an IFQ proposal is likely to affect the small boat inshore fleet, votes could be weighted to ensure smaller vessels are reasonably represented in the outcome of the referendum.

NMFS will use these guidelines and procedures to assure fair and equitable referenda. In assessing whether Council recommendations for referenda criteria are fair and equitable, NMFS will take into account, among other things, whether the criteria are rationally related to the proposed IFQ program and whether the criteria prevent any person or other entity from obtaining an excessive share of the voting privileges. Also, NMFS will evaluate the criteria in light of the National Standards under the Magnuson–Stevens Act. These considerations should help the Council and NMFS balance the goals of the program with the eligibility criteria and any vote weighting criteria, ensuring that no segment of the fishery is unduly disadvantaged by the referendum process.

Comment 5: One respondent stated that the application of a control date and establishment of a voter eligibility criterion of fishing activity relative to the control date would be unfair and inequitable. The respondent cited a new vessel owner’s lack of access to the prior owner’s landings history as the cause for this concern.

Response: The procedures and guidelines for conducting a referendum state that Councils should consider past and present harvest and participation in the fishery when establishing voter eligibility criteria. They do not specify how the Council must determine and assess past participation. Councils may

use multiple ways to determine eligibility. Setting a control date, in conjunction with landings or vessel activity requirements from a set of qualifying years, is a possible criterion, but others are also possible; for instance, current year activity may be another important consideration in determining voter eligibility.

Because the procedures and guidelines do not specify the use of a control date, the respondent’s concern would be better addressed to the Council during the development of specific IFQ program proposals and referendum criteria.

Comment 6: Of the two alternatives considered for timing of the IFQ referendum initiation letter, respondents supported the somewhat compressed referendum schedule. One commenter stated that NMFS should conduct the referendum within 60 days of receiving the Council’s initiation letter. Another requested that NMFS provide time frames for responding to referendum requests and for conducting the referendum.

Response: NMFS has provided for the compressed schedule alternative in the final rule to expedite implementation of IFQ referenda. The measure allows the Council’s referendum initiation request to be submitted after the Council has solicited and considered public comment and has selected preferred alternatives for the proposed IFQ program. This approach, unlike the alternative noted in the preamble of the proposed rule, does not require that the FMP or FMP amendment document be completed prior to requesting the referendum. Though the procedures and guidelines specify that the compressed schedule alternative may be used, a Council would have the option to complete its FMP document before submitting the referendum initiation request to NMFS.

The Councils and NMFS will execute the referendum as expeditiously as possible. The amount of time NMFS will need to conduct a referendum after submission of the initiation request is very difficult to determine. The length of time will depend on many factors, including the complexity of the eligibility or weighting criteria, the quality of the data supporting the eligibility criteria, and the number of entities involved. Any eligibility process that relies on landings data, for example, will have to include time for notification of industry members and may also include an appeals process for potential participants. On the other hand, a simple eligibility criterion requiring only that one have an active permit could be more quickly executed.

When the Council submits a specific referendum initiation request, NMFS may announce an estimated timeline for the execution of the referendum. The IFQ referendum will be executed through rulemaking. The process of drafting, clearing, and publishing the proposed rule, along with a period for public comment and preparation and publication of the final rule is likely to take more than 60 days to complete.

The proposed rule stated that the referendum rulemaking would establish a deadline for receiving ballots from eligible voters. Since a referendum in New England must accommodate the possibility of crew members participating, the window for submitting ballots may need to be generous. Crew members who are potentially eligible to vote will need time to contact NMFS, have their eligibility credentials validated, and then submit the completed ballot. After the ballots are received by NMFS, the procedures and guidelines allow up to 60 days for NMFS to determine and announce the result of the referendum.

Comment 7: A referendum conducted for a New England fishery must provide for the possibility of voting by crew members who meet all eligibility criteria, including certain income requirements. Several respondents commented on the documentation that would be needed to prove a crew member's income and period of service on a referendum-eligible vessel. One respondent specified that a crew member should be made to present pay records correlated with tax filings, as well as notarized statements from vessel owners documenting the crew member's service aboard the vessel. One respondent opposed the idea of crew members self-certifying their own compliance with the eligibility criteria (under threat of prosecution for making a false statement to the government), while another respondent supported the approach.

Response: NMFS does not collect or maintain any data on the participation and income of crew members in any New England fishery. The practices of hiring crew members and documenting their labor are believed to vary widely across the region and between fisheries. Due to these factors, the procedures and guidelines specify that the availability of documentary proof of employment and income to validate eligibility be among the Council's considerations as it develops the voter eligibility criteria recommendations specific to the subject fishery.

NMFS aims to guard against setting documentation standards that are unattainable for potentially eligible

crew members. Also, NMFS hopes to execute referenda expeditiously. Accordingly, the procedures and guidelines allow for a referendum to occur in which crew members would self-certify that they meet eligibility criteria. The Council may adopt self-certification in its eligibility criteria recommendation or may specify other documentation requirements.

Comment 8: One respondent suspected that the crew member eligibility process could be subject to abuse in attempts to affect the outcome of a referendum. The writer suggested that NMFS pay close scrutiny to crew member eligibility documentation presented by the family members of vessel owners.

Response: All documentation presented to NMFS to support claims of voter eligibility will be reviewed. Suspect materials will be turned over to the NOAA Fisheries Office for Law Enforcement for investigation and possible enforcement action.

Comment 9: Under the procedures and guidelines, one of NMFS's considerations for determining whether a referendum is likely to be fair and equitable is whether the criteria are designed to preclude any single entity from obtaining an excessive share of voting privileges. One respondent questioned NMFS's use of the term "excessive share," stating that it is undefined, and suggesting that a definition be implemented through new rulemaking.

Response: The requirement for NMFS to ensure that no single entity gains an excessive share of the voting privileges is analogous to a similar provision in the Magnuson-Stevens Act regarding limited access privilege programs (LAPPs). The maximum share limit has to be set relative to the fishery for which the IFQ program is being proposed; NMFS will not define the term "excessive share" in the procedures and guidelines, but will apply the term analogously with its usage in section 303A of the Magnuson-Stevens Act. The Council will have to determine a standard for excessive share specific to each proposed IFQ program. NMFS will consider the Council's standard for excessive share when applying the term to the referendum and when determining if the referendum is likely to be fair and equitable.

Comment 10: One commenter proposed to preclude certain non-vessel entities that may hold permits from participating in a referendum. The respondent specifically mentioned non-profit organizations and permit banks as the sorts of entities that should be excluded. The argument for the

exclusion is that such entities do not represent traditional, historic, and cultural participation, and economic investment in fisheries.

Response: By design, consistent with the general provisions of section 303A of the Magnuson-Stevens Act, the procedures and guidelines for conducting an IFQ referendum are general so that they may be applied to all New England and Gulf of Mexico fisheries and support a wide range of Council priorities. The procedures and guidelines do not aim to exclude or place at a disadvantage any entity in the fishing community.

The eligibility criteria for each IFQ referendum will be developed by the Councils through their public processes and will likely be based on the IFQ program proposal itself. The exclusion of any type of entity, including non-profit organizations and permit banks, from the referendum will have to be fully justified by the Councils in their referendum initiation requests.

Comment 11: A commenter from New England suggested that vote weighting could be used to limit the relative influence of non-vessel entities, such as permit banks, that own large blocks of permits.

Response: NMFS acknowledges this point. Vote weighting will be available to the Councils and may be applied in the referendum, so long as the recommended weighting criteria are rationally connected to the proposed IFQ program and meet NMFS's other considerations for determining that a referendum is likely to be fair and equitable. If the Councils choose to recommend vote weighting, the referendum initiation request must justify the weighting criteria and analyze alternatives to the recommended criteria.

Comment 12: The rule would require that the referendum ballot seek approval or disapproval of the IFQ program proposal. The rule also allows that, after an IFQ proposal fails to be approved by referendum, the Council may make changes to the program proposal or explain a change of circumstances in the fishery that would warrant an additional referendum, and request that NMFS conduct a subsequent referendum. One commenter, a proponent of IFQs, suggested that the rule provide for the referendum ballot to include survey questions in order to direct changes to the IFQ program proposal, should the initial referendum fail.

Response: NMFS does not support this recommendation. Section 303A(c)(6)(D) of the Magnuson-Stevens Act requires that the referendum consider the IFQ program proposal "as

ultimately developed.” NMFS will not publish a final rule on referenda procedures for a specific fishery until the Council has solicited and considered public comment and selected preferred alternatives for a proposed IFQ program. The purpose of the referendum is to determine approval or disapproval of the proposed IFQ program, rather than as a mechanism to solicit feedback on the specific alternatives of the program.

However, should NMFS and the Council(s) decide that additional information would be helpful for further development of IFQ program proposals, NMFS may include additional IFQ program materials in the envelope when the ballot is distributed to eligible voters. Survey questions or supplemental information would be separate from the ballot, and submission of a completed survey would have no effect on the validity of the ballot.

Changes from the Proposed Rule

The following table identifies substantive changes from the proposed rule that were made for purposes of clarification.

Section	Effect
§ 600.1310(a) Purpose and scope of referenda	Notes that § 600.1310 contains guidance on vote weighting as well as voter eligibility.
§ 600.1310(b)(2)(v) Initiating IFQ referenda	Requires a Council recommending vote weighting to include the rationale and expected effects for such weighting in its letter requesting initiation of a referendum.
§ 600.1310(c)(1)(iii)(C) Permit holders and other fishery participants	Clarifies that the developer of eligibility criteria permit holders and other fishery participants must consider factors determined by the Council “with jurisdiction over the fishery for which an IFQ program is proposed” to be relevant.

Section	Effect
§ 600.1310(c)(2)(ii)(A) and (B) Crew member eligibility in NEFMC IFQ referenda	Adds “during the qualifying period(s)” to (A) and changes “the eligibility period(s)” to “the qualifying period(s)” in (B).
§ 600.1310(c)(2)(iii)(E) Crew member eligibility in NEFMC IFQ referenda	Clarifies that the developer of eligibility criteria for fishery participants, including crew members, must consider any factors determined by the Council “with jurisdiction over the fishery for which an IFQ program is proposed” to be relevant.
§ 600.1310(c)(3)(iii) GMFMC’s substantially fished criterion	Clarifies that the developer of eligibility criteria for multispecies permit holders who have substantially fished the species, must consider any factors determined by the Council “with jurisdiction over the fishery for which an IFQ program is proposed” to be relevant.
§ 600.1310(d) Council–recommended criteria	Substitutes the words “apply the same” for “consider” in “A Council may also consider criteria for weighting eligible referendum votes”.
§ 600.1310(h)(2) and (h)(3) Determining the outcome of an IFQ referendum	Changes from “of those voting submit valid ballots in favor of” to “of the votes submitted on valid ballots are in favor of”.

Section	Effect
a new § 600.1310(g)(4) Referenda ballots	Stipulates that the value of weighted votes must be indicated on the ballot and a weighted vote must be cast as a single unit (i.e., the value may not be split). The full value must be applied to the selection made on the ballot. The old § 600.1310(g)(4) was renumbered as § 600.1310(g)(5).

Also, other minor changes have been made to improve the clarity and readability of the regulatory text.

Classification

The Magnuson–Stevens Act

The Assistant Administrator for Fisheries, NMFS, determined that this final rule is consistent with the Magnuson–Stevens Act as amended.

E.O. 12866

This final rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) at the proposed rule stage, as required by section 603 of the Regulatory Flexibility Act, to describe the economic impacts the proposed regulation may have on small entities. Small entities within the scope of the rule include individual fish–harvesting vessels. NMFS intended the analysis to aid in the consideration of regulatory alternatives that could minimize the economic impact on affected small entities. No comments were received from the public on the IRFA or specific economic impacts of the proposed rule.

This rule merely provides broad guidance and sets out procedures for subsequent rules with the intended effect of ensuring that IFQ program referenda are fair and equitable. While the benefits of ensuring that IFQ program referenda are fair and equitable are believed considerable; analysis of data and impacts on vessels, vessel revenues, port revenues, fish stock impacts, etc. is not possible in the absence of identifying specific fisheries and IFQ program proposal components. Estimated direct economic impacts would be evaluated in compliance with the Regulatory Flexibility Act and other

applicable Federal law at the time fishery-specific program proposals are developed. NMFS did perform an analysis of this rule and did not find any basis to conclude that small business entities would be adversely affected by this rule. Therefore, NMFS is certifying non-significance to the Chief Counsel for Advocacy of the Small Business Administration.

A more-detailed description of the action, why it is being considered, and the legal basis for this action are contained in the preamble of the proposed rule (73 FR 21893).

Paperwork Reduction Act

IFQ program referenda conducted under section 303A(c)(6)(D)(iv) of the Magnuson-Stevens Act are exempt from the Paperwork Reduction Act.

List of Subjects in 50 CFR Part 600

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 9, 2008.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons stated in the preamble, NMFS amends 50 CFR part 600 as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 1. Add subpart O consisting of §§ 600.1300 through 600.1310 to read as follows:

Subpart O—Limited Access Privilege Programs

Sec.

600.1300—600.1309 [Reserved]

600.1310 New England and Gulf of Mexico Individual Fishing Quota Referenda.

Authority: 16 U.S.C. 1801 *et seq.*

Subpart O—Limited Access Privilege Programs

§§ 600.1300—600.1309 [Reserved]

§ 600.1310 New England and Gulf of Mexico Individual Fishing Quota Referenda.

(a) *Purpose and scope.* This section establishes procedures and guidelines for referenda to be conducted on Individual Fishing Quota (IFQ) program proposals developed by the New England Fishery Management Council (NEFMC) and the Gulf of Mexico Fishery Management Council (GMFMC). These procedures and guidelines also apply to IFQ program proposals developed by NMFS for fisheries under the jurisdiction of the NEFMC or GMFMC, except for certain provisions that only apply to a fishery management

council. This section provides guidance on developing voter eligibility and vote weighting, and establishes general procedures to ensure referenda are conducted in a fair and equitable manner.

(b) *Initiating IFQ referenda.* (1) The NEFMC and the GMFMC shall not submit, and the Secretary shall not approve, an FMP or FMP amendment that would create an IFQ program until the IFQ program proposal, as ultimately developed, has been approved by a referendum of eligible voters. Paragraph (h) of this section provides criteria for determining the outcome of IFQ referenda.

(2) To initiate a referendum on a proposed IFQ program:

(i) The relevant Council must have held public hearings on the FMP or FMP amendment in which the IFQ program is proposed;

(ii) The relevant Council must have considered public comments on the proposed IFQ program;

(iii) The relevant Council must have selected preferred alternatives for the proposed IFQ program;

(iv) The chair of the Council with jurisdiction over such proposed IFQ fishery must request a referendum on the proposed IFQ program in a letter to the appropriate NMFS Regional Administrator;

(v) The letter requesting initiation of a referendum must recommend voter eligibility criteria that are consistent with the applicable requirements of paragraph (c)(1) of this section and may also include recommended criteria for vote weighting. The letter must provide the rationale supporting the Council's recommendation, as well as such additional information and analyses as needed, consistent with applicable law and provisions of this section. If a Council recommends vote weighting criteria, the letter should fully describe the rationale for and the expected effects of such weighting on the referendum;

(vi) NEFMC referenda initiation letters must: recommend criteria that are consistent with paragraph (c)(2)(iii) of this section for NMFS to use in determining the eligibility of other fishery participants to vote in the referendum; include the minimum percentage of a crew member's total income that must have been earned during the eligibility periods in the proposed IFQ fishery as discussed in paragraph (c)(2)(ii) of this section; and include criteria for "referendum eligible vessels" as described in paragraph (c)(2)(i) of this section; and

(vii) GMFMC letters initiating referenda of multispecies permit holders in the Gulf of Mexico must include

recommended criteria to be used in identifying those permit holders who have substantially fished the species to be included in the proposed IFQ program, along with alternatives to the recommendation, and supporting analyses. Guidelines for developing such recommendations are provided at paragraph (c)(3) of this section.

(3) Following a referendum that has failed to approve the IFQ proposal, any request from a Council for a new referendum in the same fishery must include an explanation of the substantive changes to the proposed IFQ program or the changes of circumstances in the fishery that would warrant initiation of an additional referendum.

(c) *Referenda voter eligibility—*(1)

Permit holders and other fishery participants. (i) To be eligible to vote in IFQ referenda, permit holders and other fishery participants must meet voter eligibility criteria.

(ii) Holders of multispecies permits in the Gulf of Mexico must have substantially fished the species proposed to be included in the IFQ program to be eligible to vote in a referendum on the proposed program.

(iii) When developing eligibility criteria for permit holders in an IFQ program referendum, the relevant Council or Secretary must consider, but is not limited to considering:

(A) The full range of entities likely to be eligible to receive initial quota allocation under the proposed IFQ program;

(B) Current and historical harvest and participation in the fishery; and

(C) Other factors as may be determined by the Council with jurisdiction over the fishery for which an IFQ program is proposed to be relevant to the fishery and to the proposed IFQ program.

(2) *Crew member eligibility in NEFMC IFQ referenda.* (i) For the purposes of this section, "referendum-eligible vessel" means a vessel, the permit holder or owner of which has been determined to be eligible to vote in the referendum on the basis of such vessel's history or other characteristics.

(ii) To be eligible to vote in an NEFMC IFQ referendum, crew members must meet the following requirements:

(A) The crew member must have worked aboard a referendum-eligible vessel at sea, during the qualifying period(s), while the vessel was engaged in fishing;

(B) If requested, the crew member must produce documentary proof of employment or service as a crew member and income during the qualifying periods. Documents that may

be required include, but are not limited to, signed crew contracts, records of payment, settlement sheets, income tax records, a signed statement from the permit holder, and other documentary evidence of the period of employment and the vessel upon which the crew member worked;

(C) During the qualifying period(s), the crew member must have derived a percentage of his/her total income from the fishery under the proposed IFQ program that is equal to or greater than the percentage determined to be significant relative to the economic value and employment practices of the fishery; and

(D) Any additional eligibility criteria promulgated by the NMFS.

(iii) When developing criteria for determining whether other fishery participants, including crew members, may participate in a NEFMC IFQ referendum, the Council or Secretary must consider, but is not limited to considering:

(A) The full range of entities likely to be eligible to receive initial quota under the proposed IFQ program;

(B) A crew member's current and historical participation in the fishery aboard a referendum-eligible vessel;

(C) The economic value of the proposed IFQ fishery, employment practices in the proposed IFQ fishery, and other economic and social factors that would bear on a determination of what percentage of a crew member's total income from the fishery should be considered significant for the purposes of this section;

(D) The availability of documentary proof of employment and income to validate eligibility; and

(E) Any other factors as may be determined by the Council to be relevant to the fishery and the proposed IFQ program.

(3) *GMFMC's substantially fished criterion.* When developing criteria for identifying those multispecies permit holders who have substantially fished the species to be included in the IFQ program proposal, the Council or Secretary must consider, but is not limited to considering:

(i) Current and historical harvest and participation in the fishery;

(ii) The economic value of and employment practices in the fishery; and

(iii) Any other factors determined by the Council with jurisdiction over the fishery for which an IFQ program is proposed to be relevant to the fishery and the proposed IFQ program.

(d) Council-recommended criteria under paragraph (c) of this section may include, but are not limited to, levels of

participation or reliance on the fishery as represented by landings, sales, expenditures, or other considerations. A Council may also apply the same criteria for weighting eligible referendum votes.

(e) *Actions by NMFS: Review of Council referendum criteria and Secretarial IFQ plans.* (1) NMFS shall determine whether Council recommended referendum criteria will provide for a fair and equitable referendum and will be consistent with national standards and other provisions of the Magnuson-Stevens Act, and other applicable legal standards. The Secretary's considerations shall include, but shall not be limited to:

(i) Whether the criteria are rationally connected to or further the objectives of the proposed IFQ program;

(ii) Whether the criteria are designed in such a way to prevent any person or single entity from obtaining an excessive share of voting privileges;

(iii) Whether the criteria are reasonable relative to the availability of documentary evidence and the possibility of validating a participant's eligibility; and

(iv) Whether the referendum can be administered and executed in a fair and equitable manner, in a reasonable time, and without subjecting industry members, the Council, or NMFS to administrative burdens, costs or other requirements that would be considered onerous.

(2) If NMFS determines that referendum criteria would not provide for a fair and equitable referendum; would not be consistent with national standards and other provisions of the Magnuson-Stevens Act, and other applicable legal standards; or, in the case of a referendum request subsequent to a failed referendum in the same fishery, that the Council has not substantively amended the IFQ proposal or circumstances have not changed sufficiently to warrant initiation of a new referendum, NMFS shall inform the Council of the Agency's decision to deny the referendum request and of the reasons for the decision.

(3) If NMFS determines that referendum criteria would provide for a fair and equitable referendum and would be consistent with national standards and other provisions of the Magnuson-Stevens Act, and other applicable legal standards; then NMFS shall conduct the referendum in accordance with procedures and guidelines provided in paragraph (f) of this section.

(4) In accordance with paragraphs (c)(2) and (3) of this section, NMFS may initiate a referendum and promulgate

referendum criteria for any IFQ program proposal advanced through a Secretarial fishery management plan (FMP) or FMP amendment under the authority of section 304(c) of the Magnuson-Stevens Act for a New England or Gulf of Mexico fishery. Such criteria must provide for a fair and equitable referendum and NMFS shall conduct the referendum in accordance with procedures and guidelines provided in paragraph (f) of this section.

(f) *Conducting IFQ referenda.* (1) NMFS shall promulgate specific referenda procedural requirements, voter eligibility requirements, and any vote weighting criteria through appropriate rulemaking.

(i) *Proposed rule.* A proposed rule shall seek public comment on the specific schedule, procedures, and other requirements for the referendum process.

(A) For NEFMC IFQ program referenda, the proposed rule shall establish procedures for documenting or certifying that other fishery participants, including crew members, meet the proposed voter eligibility criteria.

(B) For GMFMC IFQ program referenda for multispecies permit holders, the proposed rule shall include criteria to be used in identifying those permit holders who have substantially fished the species that are the subject of the proposed IFQ program.

(ii) *Final rule.* (A) If NMFS decides to proceed with the referendum after reviewing public comments, NMFS shall publish implementing regulations through a final rule in the **Federal Register** as soon as practicable after the Council determines the IFQ program proposal and supporting analyses are complete and ready for Secretarial review. Otherwise, NMFS shall publish a notice in the **Federal Register** to inform the Council and the public of its decision not to conduct the referendum, as proposed, including reasons for the Agency's decision.

(B) Upon implementation of the referendum through a final rule, NMFS shall provide eligible voters referenda ballots and shall make available information about the schedule, procedures, and eligibility requirements for the referendum process and the proposed IFQ program.

(2) NMFS shall notify the public in the region of the subject fishery of the referendum eligibility criteria.

(3) Individuals who wish to vote as other fishery participants in a NEFMC IFQ referendum, based on criteria established by the NEFMC under (c)(2), must contact NMFS and produce all required documentation and certifications to receive a ballot. NMFS

shall provide sufficient time in the referendum process to allow for crew members to request, receive, and submit referendum ballots.

(g) *Referenda ballots.* (1) Ballots shall be composed such that voters will indicate approval or disapproval of the preferred IFQ program proposal.

(2) NMFS may require voters to self-certify on referenda ballots that they meet voter eligibility criteria. To be considered valid, ballots must be signed by the eligible voter.

(3) Referenda ballots shall be numbered serially or otherwise designed to guard against submission of duplicate ballots.

(4) If votes are weighted, the value of weighted votes shall be indicated on the ballot. The weighted vote must be cast as a single unit. Its value may not be split. The full value must be applied to the selection made on the ballot.

(5) NMFS shall allow at least 30 days for eligible voters to receive and return their ballots and shall specify a deadline by which ballots must be received. Ballots received after the deadline shall not be considered valid.

(h) *Determining the outcome of an IFQ referendum.* (1) NMFS shall tally and announce the results of the referendum within 90 days of the deadline by which completed ballots must be received. NMFS may declare a referendum invalid if the Agency can demonstrate the referendum was not conducted in accordance with the procedures established in the final rule implementing the referendum.

(2) A NEFMC IFQ program referendum shall be considered approved only if more than 2/3 of the votes submitted on valid ballots are in favor of the referendum question.

(3) A GMFMC IFQ program referendum shall be considered approved only if a majority of the votes submitted on valid ballots are in favor of the referendum question.

(i) *Council actions.* (1) If NMFS notifies a Council that an IFQ program proposal has been approved through a referendum, then the Council may submit the associated FMP or FMP amendment for Secretarial review and implementation.

(2) Any changes that would modify an IFQ program proposal that was reviewed by referenda voters may invalidate the results of the referendum and require the modified program proposal to be approved through a new referendum before it can be submitted to the Secretary for review and implementation.

(3) If NMFS notifies a Council that an IFQ referendum has failed, then the Council may modify its IFQ program

proposal and request a new referendum pursuant to paragraph (b) of this section.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 070430095-7095-01]

RIN 0648-XK59

Fisheries Off West Coast States; Modifications of the West Coast Commercial and Recreational Salmon Fisheries; Inseason Actions #7, #8, #9, #10, #11, and #12

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Modification of fishing seasons, gear restrictions, and landing and possession limits; request for comments.

SUMMARY: NOAA Fisheries announces six inseason actions in the ocean salmon fisheries. Inseason actions #7, #8, and #11 modified the commercial fishery in the area from U.S./Canada Border to Cape Falcon, Oregon. Inseason action #9 modified the recreational fishery in the area from Cape Falcon, Oregon to the Oregon/California Border. Inseason action #10 modified the recreational fishery in the area from Leadbetter Point, Washington to Cape Falcon, Oregon. Inseason Action #12 modified the recreational fishery in the area from the U.S./Canada Border to Leadbetter Point, Washington.

DATES: Inseason action #7 was effective on August 2, 2008. Inseason actions #8 and #11 were effective on August 16, 2008. Inseason action #9 was effective on August 14, 2008. Inseason action #10 was effective August 17, 2008. Inseason action #12 was effective August 26, 2008. These actions remained in effect until the closing date or attainment of the subarea quotas, whichever was first, as announced in the 2008 annual management measures or through additional inseason action. Comments will be accepted through December 30, 2008.

ADDRESSES: You may submit comments, identified by RIN 0648-XK59, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>

- Fax: 206-526-6736, Attn: Peggy Busby

- Mail: 7600 Sand Point Way NE, Building 1, Seattle, WA, 98115

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Peggy Busby, by phone at 206-526-4323.

SUPPLEMENTARY INFORMATION: In the 2008 annual management measures for ocean salmon fisheries (73 FR 23971, May 1, 2008), NMFS announced the commercial and recreational fisheries in the area from the U.S./Canada Border to the U.S./Mexico Border.

The Regional Administrator (RA) consulted with representatives of the Pacific Fishery Management Council, Washington Department of Fish and Wildlife and Oregon Department of Fish and Wildlife on July 30, August 12, August 13, August 15, and August 25, 2008. The information considered related to catch to date and Chinook and coho catch rates compared to quotas and other management measures established preseason.

Inseason action #7 increased the commercial landing and possession limit for Chinook, in the area from the U.S./Canada Border to Cape Falcon, Oregon, from 35 to 50 Chinook per vessel for each open period. This action was taken to provide greater access to Chinook salmon that were available for harvest within the guideline established preseason. On July 30, 2008, the states recommended this action and the RA concurred; inseason action #7 took effect on August 2, 2008. Modification in quota and/or fishing seasons is authorized by regulations at 50 CFR 660.409 (b)(1)(i).

Inseason action #8 modified gear specific restrictions in the commercial fishery in the area from the U.S./Canada Border to Cape Falcon, Oregon, by lifting the six-inch gear restriction; thereby providing greater access to harvestable Chinook salmon. On August 13, 2008, the states recommended this